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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re the Marriage of AMANDA and  
MATTHEW FRECHETTE

AMANDA FRECHETTE,

Appellant,

v.

MATTHEW FRECHETTE,

Respondent.

E070445

(Super.Ct.No. SICVFL1658937)

OPINION

APPEAL from the Superior Court of Inyo County. Brian Lamb, Judge.

Affirmed.

Wood Law Group and Christopher R. Wood for Appellant.

Law Office of Victoria L. Campbell and Victoria L. Campbell for Respondent.

Amanda Frechette (Mother) and Matthew Frechette (Father) divorced in August 2016.<sup>1</sup> Mother and Father shared two children, S.F. and P.F. (collectively, the children). In November 2016, a stipulation and order for custody was entered, granting (1) joint legal custody to Mother and Father; (2) sole physical custody to Mother; and (3) alternate weekend visitation to Father. In November 2017, Father, who resided in Nevada, filed a request for sole legal and physical custody of the children. The family court granted Father's request and permitted the children to live in Nevada.

Mother raises two issues on appeal. First, Mother contends the family court erred by not issuing a statement of reasons concerning the modification of custody. (Fam. Code, § 3087.)<sup>2</sup> Second, Mother contends the family court erred by failing to consider the factors pertaining to a move-away order. We affirm the judgment.

## **FACTUAL AND PROCEDURAL HISTORY**

### **A. 2016 CUSTODY ORDERS**

In August 2016, as part of the judgment of dissolution, the family court ordered (1) Mother and Father to have joint legal custody of the children; (2) Mother to have sole physical custody of the children; and (3) Father to “have the minor children on an alternating two-day schedule” when Father was in Inyo County.

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<sup>1</sup> As part of the divorce judgment, Mother's name was restored to Amanda Bell. Throughout the appellate record, Mother's name is listed as Amanda Frechette. Accordingly, we use Amanda Frechette in this opinion.

<sup>2</sup> All subsequent statutory references will be to the Family Code.

In November 2016, the family court filed a stipulation and order modifying the August child custody and visitation order. The stipulation/order provided for (1) Mother and Father to share joint legal custody of the children; (2) Mother to have sole physical custody of the children; and (3) Father to have visitation with the children on alternate weekends. Father was permitted to take the children to Nevada.

B. FATHER'S REQUEST TO MODIFY CUSTODY

Mother and Father's elder daughter, S.F., was born in 2011. Their younger daughter, P.F., was born in 2014. On November 30, 2017, Father requested the family court modify its child custody order. Father requested sole legal and physical custody. Father asserted Mother should be granted "[r]easonable visitation to be arranged by mutual agreement of the parties." Father included his declaration with his request.

Father's declaration reflected the following: Mother was living with the children in Mother's father's (Grandfather) home. Mother did not pay rent or bills. Grandfather planned to sell his house. If Mother were not living with Grandfather, then Mother would be unable to support herself and the children. Mother suffered erratic mood swings that caused her to be "angry and mean."

On November 3, 2017, when Father picked up the children for visitation, Mother assaulted Father and Father's mother (Grandmother). The children witnessed Mother assault Father and Grandmother, which upset the children. Father went to urgent care due to the assault, and Grandmother required surgery due to the assault. Mother and her fiancé (Fiancé) consumed alcohol and drugs around the children. Fiancé had a criminal history that included driving under the influence, possessing drugs for sale, and

domestic violence. Father believed that Fiancé was living with Mother and the children in Grandfather's house.

Father further declared that he lived in Nevada due to his work being located in Nevada. Father made the four-hour drive to Bishop on alternating weekends to visit the children. Father stayed at Grandmother's house when visiting with the children on weekends, and the children were always happy to see him. During visits, the children slept in their own room, and Father cooked, colored, and did homework with the children. Father found schools and daycare for the children in Nevada. If the children were permitted to move to Nevada, then Father's fiancée would take the children to school or day care on her way to cosmetology school, and then Father would pick-up the children after he finished work at 3:00 p.m. Father had a long-term lease on a three-bedroom home, and he was able to provide the children a home that was free of drugs, alcohol, and violence.

C. MOTHER'S RESPONSE

Mother did not consent to Father's modification request. Mother asserted sole legal and physical custody should be granted to Mother. Mother attached her declaration to her response.

Mother declared that the children had been solely in her care for 27 months. Mother took the children to school, packed their lunches, dressed the children, picked them up from school, helped them with homework, and volunteered in their classrooms. Fiancé did not reside in Grandfather's house.

Grandfather was planning to sell his house, which Mother lived in with the children. Mother was pregnant with Fiancé's child. Fiancé obtained "a traveling union job out of Michig[an] to provide for [Mother], [the children], and [the] new baby on the way." Fiancé's job required ongoing drug testing. Fiancé tested negative for drugs. Mother did not use drugs or alcohol in Grandfather's house, and drugs and alcohol were not around the children. Mother did not have a history of anger, violence, or mental health issues.

On November 3, 2017, during the custody exchange, Father yelled at Mother while Mother was holding P.F. Mother told Father to leave and not to yell in front of the children. Father refused to leave. Mother took the children to Father's car. Grandmother and Father yelled at Mother and pushed her into her car. Mother then acted in defense of herself and her five-month old fetus. After the incident, Mother went to the hospital due to decreased fetal movement.

In May 2016, Father verbally abused Mother with the children present. In June 2017, Father dropped off the children and Mother noticed S.F. had a rash and P.F. had a large cut on her face. Father refused to provide Mother with an explanation of what happened to the children.

Mother requested sole physical and legal custody of the children because Father's fiancée posted videos of the children on social media wherein the children were naked in a bathtub. Mother believed this showed a lack of respect for the children's privacy. Additionally, in December 2017, after S.F. had been ill during the day, Father took the children to a Christmas parade the same night. Mother asserted this showed

Father's "selfishness when it comes to his wants over the needs of his sick child who should've stayed home in bed, relaxing."

D. FATHER'S REPLY

Father filed a declaration in reply to Mother's response. Father declared that Mother had a history of physical violence. Father had "been on the receiving end of it several times as far back as high school, when she tried to shove [Father] down the stairs of [his] apartment during an argument." The Inyo County District Attorney filed criminal charges against Mother, including a domestic violence charge, for Mother's attack against Father and Grandmother on November 3, 2017.

Father did not recall the May 2016 incident of verbal abuse described by Mother. In regard to the time Father dropped the children off and S.F. had a rash and P.F. had a cut, Mother was not home when Father dropped off the children; Father told Grandfather the rash was due to swimming and the cut was from P.F. hitting the corner of a desk. As to the bath video posted to social media, the three-year old's buttocks were visible in a 10 second video that was on social media for 24 hours. In regard to taking the sick child to the parade, Father stayed home with S.F. on the day of the parade. Father checked S.F.'s temperature throughout the day, and it remained normal.

E. HEARING

1. *FATHER'S CASE*

On December 19, 2017, the family court held a hearing in the matter. Exhibits offered by Father included (1) statements made to the Inyo County Sheriff's Department, and (2) medical reports. Father's statement to the Sheriff reflected that, on

November 3, 2017, Mother and Grandmother put the children in Father's or Grandmother's car, while Father was in Grandfather's house speaking with Grandfather. Father then heard Mother yelling. Father ran outside and saw Mother yelling at Grandmother and pushing Grandmother. Father inserted himself between the two women. Mother yelled at Father, called him "a 'Piece of Shit,' " and pushed him with her hand. Mother pushed Father toward the street and then kicked him "in the groin with full force." Mother then "pushed and struck" Grandmother. Father and Grandmother entered the car and drove away.

Father testified at the hearing. Mother was arrested and charged due to the November 3rd domestic violence incident. Father explained that the November 3rd argument began "as soon as we walked in the door" at Grandfather's house. Mother told Father she wanted \$20 for S.F.'s soccer photographs because Mother had paid for the photographs, but the coach gave the photographs to Father. Mother also told Father he could not take the children's clothes—that he needed to provide separate clothes for the children, apart from those kept at Mother's house.

Grandmother testified at the hearing. On November 3, when Mother and Grandmother were putting the children in the car, Mother yelled at Grandmother about how Father could afford to give Mother \$20. Mother pushed Grandmother and punched Grandmother's chest. Father then inserted himself between the women. The next day, Grandmother felt a burning sensation in her chest. On December 5, Grandmother had surgery because her saline breast implant had ruptured and deflated. Grandmother believed her breast implant ruptured when Mother punched her chest. Grandmother

believed S.F. regularly provided for P.F.'s needs, e.g., taking P.F. to the restroom, because, during visits, Grandmother witnessed S.F. "jump[] up like it's her duty" to take care of P.F.

Grandfather testified at the hearing. Grandfather recalled an argument between Mother and Fiancé that resulted in the police being called to Grandfather's house. Grandfather would like to see Mother "get some help for issues that she may have," such as participating in therapy. Fiancé does not live in Grandfather's home, but "[Fiancé] stays there sometimes."

P.F.'s, preschool teacher testified at the hearing. The teacher has never seen an issue with P.F. that would cause her concern. P.F. "was always well dressed, had a good lunch, [and] had a good attitude." Teacher was aware of Fiancé's criminal history, which included a felony conviction.

Mother testified at the hearing; she was called as a witness by Father. On September 26, 2017, Mother texted Ms. Weatherford, who was identified as a third-party witness, " 'I'm good, just getting a restraining order on [Fiancé], had an incident tonight and threats from him for the past weeks. He's using again so he's not acting right or normal.' "

## 2. *MOTHER'S CASE*

Mother was self-represented. Mother said she wanted to testify. The family court explained that a criminal complaint had been filed against Mother with respect to the November 3rd domestic violence incident. The family court advised Mother, "If you testify in this matter about it, your statements about the incident are of record and

they can be used against you in the criminal case to the extent that they're admitted and relevant . . . if you were asked you would have the right to assert your privilege against self-incrimination and not answer." The court asked, "Did you want to take the stand and testify?" Mother responded, "No. Thank you, your Honor."

### 3. *COURT'S COMMENTS*

At the end of the hearing, the family court said, "This is going to be a big decision. The current custody and visitation arrangements were reached by the parties by agreement after judgment in this dissolution matter, and that was just about a year ago, and if the court is going to make a decision changing custody, we're not talking about them moving across the street, but they're going to be moving hours away into another state, that's a substantial change. I have to give that more consideration than just the time I've been able to attend to it in preparation for this hearing today and this morning. [¶] So I'm going to take the matter under advisement pending the court's decision. . . . [¶] . . . [¶] For the reasons stated, the matter stands submitted."

### F. CRIMINAL CASE

On December 12, 2017, the Inyo County District Attorney filed a misdemeanor complaint against Mother. (Inyo County Superior Court case No. MBCRM 18-61884.) The complaint included two charges. The first count was for battery/domestic violence against Father. (Pen. Code, § 243, subd. (e)(1).) The second count was for simple battery against Grandmother. (Pen. Code, §§ 242 & 243, subd. (a).)

On February 26, 2018, the criminal court filed an order granting deferred entry of judgment. The order reflects Mother was “convicted” of misdemeanor domestic violence/battery (Pen. Code, § 243, subd. (e)(1)), but was granted deferred entry of judgment for 24 months subject to the conditions that she: (1) successfully complete a 52-week batterer intervention program; (2) follow all custody orders in the family court case; (3) have no contact with Father and Grandmother, other than peacefully exchanging the children; and (4) obey all laws.<sup>3</sup> Also on February 26, 2018, the criminal court issued a domestic violence order of protection. (Pen. Code, § 136.2.) The order protects Father and Grandmother from Mother. The order expires in February 2020.

G. RULING

On March 19, 2018, the family court issued its findings and order. The family court used Judicial Council forms FL-340 and FL-341. The court awarded Father sole legal and physical custody of the children. The court granted Mother reasonable visitation. The court wrote, “The minor children may reside with [Father] in the S[t]ate of California or the State of Nevada. [Mother] must comply with the criminal

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<sup>3</sup> The criminal court’s order granting deferred entry of judgment reflects Mother was “convicted of a [m]isdemeanor.” “A defendant’s plea of guilty pursuant to the deferred entry of judgment ‘shall not constitute a conviction for any purpose unless a judgment of guilty is entered pursuant to Section 1000.3’ [Citation.] [Penal Code s]ection 1000.3 provides that if the defendant’s rehabilitation is unsuccessful, the district attorney, probation department, or court may move for entry of judgment.” (*In re Scoggins* (2001) 94 Cal.App.4th 650, 655.)

protective order (‘CPO’) issued in *People v. Amanda Frechette*, No. MBCRM-18-61884.”

## **DISCUSSION**

### **A.     STATEMENT OF REASONS**

Mother contends the family court erred by failing to issue a statement of reasons concerning the modification of custody.

“An order for joint custody may be modified or terminated upon the petition of one or both parents or on the court’s own motion if it is shown that the best interest of the child requires modification or termination of the order. If either parent opposes the modification or termination order, the court shall state in its decision the reasons for modification or termination of the joint custody order.” (§ 3087.) “ ‘Joint custody’ means joint physical custody and joint legal custody.” (§ 3002.)

Father contends the order being modified was not a joint custody order because the prior order granted joint legal custody, but sole physical custody in favor of Mother. (§ 3002.) In other words, Father asserts that because there was not joint legal *and* physical custody as part of the prior order, the family court was not modifying a joint custody order. Father contends that because the family court was not modifying a joint custody order, section 3087 is inapplicable.

Father’s argument may find some support in the plain language of the statutes. (§ 3002.) However, a reasonable argument could be made that the result would be absurd. (See *People v. Mendoza* (2000) 78 Cal.App.4th 918, 929 [court must interpret statutes to promote the statute’s purpose and “avoid absurd consequences”].) The result

being that a family court would be required to issue a statement of reasons when modifying an order for joint legal and physical custody, but not required to issue a statement of reasons when taking sole physical custody away from one parent and giving it to another while also modifying joint legal custody to sole legal custody. Arguably, a complete change in sole physical custody and joint legal custody is a greater change than a modification of joint legal and physical custody. Therefore, it would be odd that a statement of reasons is not required when making the, arguably, greater change.

Rather than decide the foregoing issue, we will assume, for the sake of judicial efficiency, that the family court erred by not providing a statement of reasons. (§ 3087.) We cannot reverse a judgment unless the assumed error resulted in prejudice, i.e., “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*In re Dakota J.* (2015) 242 Cal.App.4th 619, 630.) It is the appellant’s burden to demonstrate prejudice. (*Kern County Dept. of Child Support Services v. Camacho* (2012) 209 Cal.App.4th 1028, 1036.)

The statement of reasons that the court is required to provide under section 3087 is not a statement of the court’s legal reasoning, rather, it is designed “to provide parents with the reasons—in plain, everyday English—why the court granted or denied joint custody.” (*In re Marriage of Buser* (1987) 190 Cal.App.3d 639, 642.) The statement of reasons is not the same as a statement of decision. A statement of decision is meant to give an appellate court “the factual and legal basis for the trial court’s determination of

the issues being reviewed on appeal.”<sup>4</sup> (*Id.* at pp. 642-643.) The statement of reasons is designed for the parents—not the appellate court. (*Ibid.*)

Given the foregoing law, it is unclear how a result more favorable to Mother would have occurred absent the assumed error. It appears that if the family court had provided a statement of reasons, the reasons would only have provided Mother with an explanation—not the reasonable probability of a different outcome. Mother fails to explain why, if the court had published its reasoning, it is reasonably probable that the case would have been resolved in favor of Mother. We conclude Mother was not prejudiced by the assumed error because it has not been shown that, but for the assumed error, a result more favorable to Mother is reasonably likely to have occurred.

In regard to prejudice, Mother writes, “In this matter, additional prejudice is placed on Mother as a result of the Trial Court’s error because the Trial Court’s statement of reasons as required by Family Code [section] 3087 is designed to provide Mother the reasons for the Trial Court’s decision. Instead, Mother is left without custody of her daughters and with uncertain visitation.” Mother fails to explain how a result more favorable to her would have reasonably occurred absent the assumed error. Accordingly, we are not persuaded that Mother was prejudiced by the assumed error.

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<sup>4</sup> An error involving the failure to issue a statement of decision is subject to harmless error review. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1102.)

B. MOVE-AWAY FACTORS

Mother contends the family court erred by not considering the required move-away factors.

“In general, ‘[t]he standard of appellate review of custody and visitation orders is the deferential abuse of discretion test.’ ” (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 14.) Failure to follow the applicable law would constitute an abuse of discretion. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 282-283.)

“The law is well settled as to how a court is to proceed when a parent with sole custody seeks to move away and take the child. In a sole custody case, the changed circumstance rule governs. The rule provides that a parent who is entitled under a final custody determination to sole physical custody of a child has a right to change the child’s residence, subject to a court’s power to preclude a removal that would prejudice the child’s rights or welfare.” (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 363.)

“ ‘[I]n assessing “prejudice” to the child’s welfare as a result of relocating . . . [the family court] may take into consideration the nature of the child’s existing contact with both parents . . . and the child’s age, community ties, and health and educational needs. Where appropriate, it must also take into account the preferences of the child.’ ” (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1089.)

“[W]hen the trial court is confronted with a joint custody move away case, there are other considerations and different guidelines apply. As our Supreme Court has indicated, when parents share joint custody a different analysis from the one used in sole custody cases may be required.” (*Niko v. Foreman, supra*, 144 Cal.App.4th at p.

363, citing *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 40, fn. 12.) “The value in preserving an established custodial arrangement and maintaining stability in a child’s life is obvious. But when the status quo is no longer viable and parents have joint custody, a court must review de novo the best interest of the child. It can fashion a new time-share arrangement for the parents.” (*Niko*, at pp. 363-364.) In other words, the court must consider the “best interest” factors, which include considerations such as (1) the child’s health, safety, and welfare, (2) any history of child abuse, and (3) the amount of contact the child has had with both parents. (§ 3011; *In re Marriage of Rose and Richardson* (2002) 102 Cal.App.4th 941, 950.)

Our Supreme Court has explained, “[C]ourts would do well to state on the record that they have considered [a child’s] interest in stability, but the lack of such a statement does not constitute error and does not indicate that the court failed to properly discharge its duties.” (*In re Marriage of LaMusga*, *supra*, 32 Cal.4th at p. 1093.)

At the end of the hearing, the family court said, “This is going to be a big decision. The current custody and visitation arrangements were reached by the parties by agreement after judgment in this dissolution matter, and that was just about a year ago, and if the court is going to make a decision changing custody, we’re not talking about them moving across the street, but they’re going to be moving hours away into another state, that’s a substantial change. I have to give that more consideration than just the time I’ve been able to attend to it in preparation for this hearing today and this morning. [¶] So I’m going to take the matter under advisement pending the court’s

decision. . . . [¶] . . . [¶] For the reasons stated, the matter stands submitted.” The family court took three months to issue its ruling.

The family court’s comments reflect that it understood its decision would be significant and that it required thoughtful consideration of the law and evidence. The family court also recognized that granting Father’s request meant the children would be moving to Nevada. The three months that the family court took to render its ruling could be viewed as the court thoughtfully considering the law and evidence. Ultimately, however, the record is silent as to exactly what the family court’s thought process may have been in reaching its decision. This court cannot assume the family court erred based upon a silent record. “When a record is silent on a point urged as error, we indulge all presumptions in favor of the judgment.” (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794; see also *Taylor v. Nu Digital Marketing, Inc.* (2016) 245 Cal.App.4th 283, 287-288.).

Mother does not direct this court to where, in the record, it is affirmatively shown that the family court disregarded the law when permitting Father to move the children to Nevada. Mother’s record citations direct this court to (1) the family court’s judgment on Judicial Council Forms FL-340 and FL-341; and (2) the family court’s denial of Mother’s requests for (a) an order setting aside the modification of child custody; and (b) a stay of the family court’s order pending appellate review. Mother does not explain how either of these documents affirmatively show the family court failed to consider the move-away factors.

Mother cites *Jane J. v. Superior Court* (2015) 237 Cal.App.4th 894 (*Jane J.*) to support her contention. In *Jane J.*, the appellate court concluded the lower court erred in modifying custody because the lower court “was influenced by an erroneous understanding of the applicable law.” (*Id.* at p. 901.) In giving custody to the father, the lower court said, “ ‘It’s time [the father] had an opportunity to parent these children. I’m going to change custody. He needs to be given the opportunity to be the parent that he’s striving to be in the limited time that he has.’ ” (*Id.* at p. 900.) The appellate court concluded that the lower court “discounted [the father’s] initial burden, as the moving noncustodial parent, to address the potential disruptive impact of an out-of-state move-away, including its effect on the children’s existing educational, physical, emotional and familial relationships.” (*Id.* at p. 901.) The appellate court found the lower court’s reasoning to be problematic, explaining, “It is not enough to argue that it is time to switch sides to give the other parent the opportunity to take control.” (*Id.* at p. 903.)

In *Jane J.*, *supra*, 237 Cal.App.4th 894 there was an affirmative indication the lower court’s reasoning may have been flawed because the lower court said, “ ‘It’s time [the father] had an opportunity to parent these children. I’m going to change custody. He needs to be given the opportunity to be the parent that he’s striving to be in the limited time that he has.’ ” (*Jane J.*, at p. 900.) In the instant case, the record is silent as to the family court’s thought process. We cannot infer from the silent record the family court disregarded the relevant factors. (*Amato v. Mercury Casualty Co.*, *supra*, 18 Cal.App.4th at p. 1794; see also *Taylor v. Nu Digital Marketing, Inc.*, *supra*, 245

Cal.App.4th at pp. 287-288.) Therefore, we find Mother’s reliance on *Jane J.* to be unpersuasive. In sum, Mother has failed to demonstrate the family court erred.<sup>5</sup>

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<sup>5</sup> In Mother’s reply brief, she asserts, “In sum, because the Trial Court failed to consider all of the relevant factors and because the evidence did not support Father’s burden of a change of circumstances establishing that a move would not be detrimental, the Trial Court abused its discretion in modifying and permitting an out-of-state move.” In Mother’s opening brief, she identified the second issue on appeal as the family court having erred because it failed to consider the required move-away factors. Specifically, Mother wrote, “Second, whether the Trial Court’s failure to weigh and consider any of the applicable ‘move-away’ factors in permitting an out of state move constitutes an abuse of discretion.” Mother did not raise a lack of evidence as a third issue in her opening brief. Accordingly, we will not review Mother’s contention that an error occurred due to Father’s failure to meet his burden of proof. (*People v. Zamudio* (2008) 43 Cal.4th 327, 353-354 [an issue “ ‘may not be raised for the first time in a reply brief’ ”]; *Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 900 [declining to address an issue raised for the first time in a reply brief].)

In a footnote in Mother’s opening brief, she asserts the family court’s “reference to and reliance on the criminal action denied her due process.” We do not review the due process issue because it is raised in a footnote. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [appellate brief must “[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument”]; *People v. Crosswhite* (2002) 101 Cal.App.4th 494, 502, fn. 5 [argument is forfeited “by raising it only in a footnote under an argument heading which gives no notice of the contention”].)

## DISPOSITION

The order is affirmed. Respondent is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER

J.

We concur:

RAMIREZ

P. J.

MENETREZ

J.